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No. 03-972

In the

Supreme Court of the United States

CAROL PAPPAS, JOHN H. PAPPAS, JR., and HARRY PAPPAS,
Petitioners,

v.

CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, FREMONT STREET EXPERIENCE LIMITED LIABILITY COMPANY, and FREMONT STREET EXPERIENCE PARKING CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Institute for Justice respectfully move this Court for leave to file the attached amicus curiae brief in support of Petitioners, Carol Pappas, et al. Consent to the filing of this brief has been granted by counsel for Petitioner, and has been lodged with the Clerk of this Court. Respondents, Las Vegas Downtown Redevelopment Agency, et al., have withheld consent, necessitating the filing of this motion.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Attorneys for Pacific Legal Foundation have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 30 years.

Pacific Legal Foundation has likewise been involved as an amicus in cases dealing with the specific meaning of the Public Use Clause in cases ranging from *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), to the present case when it was before the Nevada Supreme Court. Because of the Foundation's experience in the field of the Takings and Public Use Clauses, it can add a unique perspective that will assist this Court's consideration of this case.

The Institute for Justice is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational

liberty, and the free exchange of ideas. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *See United States v. James Daniel Good*, 510 U.S. 43, 61 (1993). It litigates property rights cases throughout the country and files amicus curiae briefs in important cases nationwide, including every major United States Supreme Court property rights case of the past ten years. The Institute regularly brings cases on behalf of property owners fighting condemnation of their homes or businesses for the benefit of private parties. It also files amicus curiae briefs in state supreme courts on behalf of owners fighting the government's right to take their property, and it filed a brief in support of the Pappas family in the instant case before the Nevada Supreme Court.

The present case represents a paradigmatic example of what happens when courts are too deferential to legislative determinations of public use. In many communities, blighted neighborhoods often characterized by an excess of "adult" oriented entertainment. Here, an ordinary business establishment belonging to Mrs. Pappas and her family was declared blighted and condemned in order to make way for a parking lot owned by a consortium of casinos that advertises itself euphemistically as the place "where grown ups come to play." http://www.a2zlasvegas.com/fse/fse06.html (Fremont Street Experience press release titled "Downtown Las Vegas Visitor Profile Accentuates Adult Environment") (last visited Feb. 3, 2004).

This amicus brief will urge this Court to grant review in order to resolve the conflict over the appropriate level of review of legislative actions that result in the condemnation of private property for the benefit of private developers. Without meaningful scrutiny of legislative determinations of blight made to justify the condemnation of private property, the "Public Use

Clause" will be little more than precatory fluff. Amici Pacific Legal Foundation and the Institute for Justice believe that they can add insight as to why it is important for this Court to grant the petition and respectfully request that this motion to file a brief amicus curiae be *granted.*

DATED: February, 2003.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Nevada's reading of *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), violates the fundamental constitutional right of private property ownership by permitting local governmental agencies acting in the name of "economic redevelopment" to take property that is neither blighted nor surrounded by blight and give it to other private parties who supposedly can use that property more profitably on the theory that enhanced private profitability indirectly will benefit the public.

2. Whether the conflict among state courts interpreting *Berman* and *Midkiff* in addressing the extent to which local governmental agencies can take property from one private owner and give that property to another private owner in the name of "economic redevelopment" demonstrates the need to revisit and clarify the holdings of those decisions.

3. Whether, if the Nevada Supreme Court's reading of *Berman* and *Midkiff* is accurate, this Court must now revitalize the "public use" limitation placed on the power of eminent domain by the Fifth and Fourteenth Amendments in light of this Court's more recent decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and in light of recent abuses of that power in the name of "economic redevelopment."

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INTEREST OF AMICI CURIAE

The interest of Amici is described in the motion to file this brief.[1]

INTRODUCTION AND SUMMARY

When a government announces an intention to condemn private property for a public use, the private owners are necessarily concerned. Even with the guarantee of just compensation, many landowners experience a sense of violation and will often suffer demoralization costs that cannot be redressed with the payment of cash. Nevertheless, most landowners will, in time, accept the importance of government's ability to condemn private property for the greater public good when legitimate public projects are at stake. However, when private property is condemned to make way for what appears for all practical purposes to be a private use, the sense of injury experienced by landowners may be beyond repair.

In past years this Court has recognized that public projects that require the exercise of the power of eminent domain may involve more than those projects that are actually used and occupied by the public or government installations. Beginning in cases like *Berman v. Parker*, 348 U.S. 26 (1954), this Court has counseled for a broader than literal reading of the words "public use." But with this relaxed standard for reviewing public use determinations, there has come a growing sense of unfairness as landowners are evicted from their properties to make way for private commercial development that sometimes appears to be more a result of political connectedness than of any actual public use or purpose. Courts and the commentators

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[1] Pursuant to Rule 37.6, Amici Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

have reacted to this growing sense of unease with a variety of actual and proposed review standards that defy easy categorization. It has now come to the point that what condemnors can accomplish with impunity in one jurisdiction they cannot in another. Some lower state courts see their role as one that must affirm any scheme where the condemning agency chants the magical words "public purpose." Other courts believe a more searching standard of review is in order, a view with which many legal scholars agree.

It is time, therefore, for this Court again to step into the breach and provide guidance as to the appropriate standard of review when a governmental entity seeks to condemn private property to facilitate a largely private venture.

This brief amicus curiae will demonstrate first that the standard employed by the Nevada Supreme Court is inconsistent with that of many other courts. Second, Amici will show that the employment of lax standards of review of questions of public use has led to rampant abuse in many states. Third, the public policy considerations that favor a more searching review of takings of private property that largely benefit private interests will be addressed—starting with early and emphatic statements of this Court and ending with citation of the many recent scholars who are calling for greater judicial review of private takings.

ARGUMENT

I

MANY COURTS HAVE APPLIED MORE SEARCHING REVIEWS OF ASSERTIONS OF PUBLIC USE THAN FOLLOWED BY THE COURT BELOW

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 245, this Court correctly noted that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it

would serve no legitimate purpose of government and would thus be void." But this Court also held that in reviewing an exercise of the condemnation power where it is alleged that no public use is involved, "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility.'" *Id.* at 240 (citation omitted). Moreover, this Court held, a court must "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 241 (citation omitted). Unfortunately, some courts, such as the Nevada court below, have interpreted this standard of review to call for an overly limited view of the courts' role to review suspect exercises of the power to condemn private property. *See, e.g.*, Opinion in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 10-11 (Nev. 2003), reproduced in Petitioners' Appendix at 14a-15a.

A number of courts have been confronted with condemnations of private property where there was a strong possibility that what was involved was little more than a "purely private taking" dressed up with a bit of "public purpose" lipstick. In these circumstances, courts have struggled with finding a means to provide some sort of meaningful review of the taking, regardless of the view of some courts that the standards of review should be overly deferential.

As Professor Merrill has noted, many courts have shown themselves "much less deferential to legislative declarations of public use than one would expect" from inaccurate suggestions that *Midkiff* and similar cases stand for the proposition that the state of the law is for courts to eschew meaningful judicial review in this area. Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 65 (1986). Professor Merrill surveyed all indexed federal and state appellate opinions, from 1954 through 1985, that touched on public use questions; he found a significant number holding that a taking does not serve a public use, and that the percentage of such decisions generally

increased over the 31-year period. *Id.* at 65, 97. Of the 308 opinions in the sample, "the relatively high number" of 47—15.3%—held that the proposed taking did not serve a public use. Among state court rulings, roughly one in six—16.2%—reached that conclusion. *Id.* at 96. In other words, there are a minority of states that have found it necessary to engage in a more searching review.

A typical rationale was offered by the New Hampshire Supreme court in *Merrill v. City of Manchester*, 499 A.2d 216 (N.H. 1985). The city had sought to condemn a family woodlot for use as an industrial park. Relying on an analogous Public Use Clause in the New Hampshire Constitution, the court weighed the public benefit against the social costs of losing the property's use as intended by its longtime owners. Because "the social costs exceed the probable benefits, . . . the project cannot be said to be built for a public use." *Id.* at 217. This elegant formula offers a valuable example for analyzing the present case, in which an ongoing private business—an entity providing social benefit—was deprived of its valuable private property.

As early as 1971, a commentator already found courts in a number of states insisting on an active, rather than passive, approach to deferential review of condemnations, "conforming to the principle that '[t]o hold that these decisions cannot be reviewed, no matter how arbitrary they may be, would be unsound and unjust.'" Michael V. McIntire, *"Necessity" in Condemnation Cases—Who Speaks for the People?*, 22 Hastings L.J. 561, 567 (1971) (quoting *Road Review League v. Boyd*, 270 F. Supp. 650, 660 (S.D.N.Y. 1967)).

If Professor Merrill could write—18 years ago, in the wake of *Midkiff*—that "judicial enforcement of the public use requirement is not a thing of the past . . . [but rather], is generally on the rise," Merrill, *supra*, at 97 n.6, the observation can be made with equal force today.

Significant recent rulings have affirmed that court review of eminent domain condemnations should not amount to rubber stamping. For instance, the Connecticut Supreme Court barred the City of Bridgeport from using eminent domain to take the venerable Pequonnock Yacht Club in order to market the land to private developers. The court held that it was unreasonable for the government to take the yacht club without considering if the club could be integrated into the plan. *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002). "'Just because the property may be desirable to the defendants does not justify its taking by eminent domain.'" *Id.* (quoting trial court's memorandum). The Fifth Amendment should provide no less protection than this.

In *In re Condemnation of 110 Washington St.*, 767 A.2d 1154 (Pa. Commw. Ct.), *appeal denied*, 788 A.2d 379 (Pa. 2001), the Pennsylvania Commonwealth Court struck down a condemnation that was for all intents and purposes stage-managed by a private developer that had entered into a contract with the redevelopment agency. The court pointed out that eminent domain power, an aspect of sovereignty, cannot be delegated—without legislative authorization—to a private party, nor can it be put to an essentially private use. Relying in part on precedents of this Court, the Pennsylvania court found that such a private taking would violate the state constitution's Public Use Clause. Again, these principles should apply equally when evaluating the protections of the federal Constitution for private landowners.

In a landmark ruling relying on both the Fifth Amendment to the United States Constitution and the Illinois Constitution, the Illinois Supreme Court stopped an attempt by a development authority to take private property to provide land for a parking lot for a thriving adjacent racetrack. *Southwestern Illinois Development Authority v. National City Environmental L.L.C.*, 768 N.E.2d 1 (Ill. 2002). Notably, the court observed that

> revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow [the race track] to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

Id. at 10-11. In other words just because some public good might flow from the project, whether it be a racetrack parking lot or a downtown Las Vegas adult-oriented casino parking lot, cogent reasons must be available to explain why the racetrack (or the casino) should not be required to utilize the open real estate market.

The decision in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot with unpublished opinion at* 60 Fed. Appx. 123 (9th Cir. 2003), likewise goes to the heart of the public use question. In that case, the City of Lancaster sought to condemn a discount store to enable the expansion of a neighboring Costco store. The district court rejected the Lancaster redevelopment agency's claims of public use as pretextual, because the evidence showed that the purpose of the condemnation of the property being leased by plaintiff was to accommodate the demands of another, competing retailer, and that there was no present blight to be remedied. *Id.* at 1130-31.

Most recently, the South Carolina Supreme Court struck down, on state constitutional grounds, a purported public use take (of property belonging to the State of Georgia within the State of South Carolina), noting first that "[w]e take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess, and defend property." *Georgia Dept. of Transp. v. Jasper County*, 586

S.E.2d 853, 856 (S.C. 2003). The court found "[t]he involuntary taking of an individual's property by the government is not justified unless the property is taken for public use—a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property." *Id.* at 857.

At least from the period chronicled by Professor Merrill right up to today, there has been a continuous, significant stream of judicial opinions which—even while exercising deference—have found condemnation actions failing the public use test. These courts have recognized that their deference must be shaped and qualified by their obligations to the Fifth Amendment and to the principle that,

> [o]ne man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well designed .... [Eminent domain] never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan.

Sweetwater Valley Civic Association v. National City, 555 P.2d 1099, 1103 (Cal. 1976).

On the other side of the ledger are cases like the one below, where courts have been overly deferential to legislative findings of public use. If too literal an adherence is paid to *Midkiff*'s language of "impossibility" or "palpably without reasonable foundation" then courts, such as the Nevada Supreme Court, will issue rulings in conflict with the more sensible views of the judicial role of "public use" review described above. And, without such review, the abuses described in the next section will continue.

II

OVERLY DEFERENTIAL STANDARDS OF "PUBLIC USE" HAVE LED TO UNCHECKED ABUSES OF THE POWER OF EMINENT DOMAIN

The justification for many of the private takings such as that of the Pappas' property is that by subsidizing one private business (even at the expense of another) the economy of the neighborhood improves, thereby benefitting the entire community. This "rising tide raises all boats" sort of mentality may or may not be good public policy, but if done without adequate attention to constitutional requirements we will be "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In other words, if any general benefit to the public can satisfy the public use limitation—even when such benefits are incidental to a private company's profit and success—then the public use limitation would be nullified, because every successful business provides some sort of benefit to the public.

To equate public use with public benefit enables a party to use eminent domain whenever it can convince public authorities that its business enhances the community in some way. Unfortunately, this means that the power to condemn private property will fall into the hands of the most politically influential parties. When meaningfully enforced, however, the public use requirement prevents politically powerful groups from using the state's eminent domain power for their own purposes, and enriching themselves by taking away the property of the less politically successful. Without meaningful review, as is often the case today, abuses become rampant.

In the past 5 years alone, at least 3 condemnation proceedings have been filed in Nevada to benefit private developers, rather than a public use. Dana Berliner, *Public*

Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain 129 (2003), *available at* http://www.castlecoalition.org/report/report.shtml. Another 15 have been threatened. *Id.* Other notable states include California (223 and 635 actual and threatened, respectively), Florida (67 and 2,225), Michigan (138 and 173), Maryland (127 and 1,110), Michigan (138 and 173), Ohio (90 and 331), and Pennsylvania (2517 and 108). *Id.* at 20, 52, 100, 159, and 173. Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998 while another 6,650 properties have been threatened with condemnation for private uses. *Id.* at 2. In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners who often have few resources available to oppose a condemnation. Berliner's study recounts, for example, instances where local governments have:

- Evicted four elderly siblings in Bristol, Connecticut, from their home of the last 60 years for an industrial park;
- Destroyed a black middle-class neighborhood in Atlantic City . . . in order to build a tunnel to a new casino . . .;
- Removed a woman in her 80s from her home of 55 years for the claimed purpose of expanding a sewer plant, but Bremerton, Washington actually gave her former home to an auto dealership;
- Condemned 10 homes for a shopping center and parking lot in Hurst, Texas and forced them to move while the spouses in two of the homes were dying of cancer;

- Condemned a family's home in Florida so that the manager of a planned new golf course could live in it.

Id. at 3.

Most eminent domain abuse occurs at the local level; for example, the City of Mesa, Arizona, recently tried to condemn a small automobile shop called Bailey's Brake Service in order to transfer it to a private party to construct a hardware store. *See* Sam Staley, *Wrecking Property Rights*, Reason, Feb. 2003, at 32 (2003 WL 5748895).[2] And the City of Merriam, Kansas, recently condemned a Toyota dealership, in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4 (1999 WL 2402262).

Only by restoring a meaningful degree of judicial review to these private takings can landowners be protected in a manner contemplated by the United States Constitution.

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[2] To be sure, the Arizona Appellate Court recently struck down this particular condemnation, but only after expressly noting that it was basing its decision on the Arizona State Constitution, a document that provides considerably more protection to landowners, and therefore less opportunity for abuse, than the federal Constitution. *Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. App. 2003). In rejecting this pretextual taking of a private brake shop for a private hardware store, the Arizona court rejected application of the standards often attributed to *Hawaii Housing Authority*, noting that "[t]he federal constitution provides considerably less protection against eminent domain than the state Constitution provides." *Id.* Perhaps the degree of protection provided in Arizona is, in truth, more in keeping what federal standards *ought* to provide and a good reason for this Court to grant the petition.

III

PUBLIC POLICY FAVORS AND THE CONSTITUTION DEMANDS A MORE SEARCHING STANDARD OF JUDICIAL REVIEW OF CONDEMNATIONS OF PRIVATE PROPERTY WHEN IT IS ALLEGED THAT THE TAKING WILL PRIMARILY BENEFIT PRIVATE PARTIES

A. This Court Has Recognized the Importance of Checking Private Takings

Beginning with *Calder v. Bull*, 3 U.S. 386 (1798), this Court has recognized the importance of the role of courts to be a check on private takings. For example, in *Calder*, Justice Chase denounced unjust laws, singling out for criticism

> a law that takes property from A. and gives it to B: It is against all reason and justice . . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.

Id. at 388-89.

Likewise, Justice Story wrote for the Court in *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829), "[t]hat government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint." Justice Story continued:

> We know of no case in which a legislative act to transfer the property of A, to B, without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been consistently resisted as inconsistent with just principles, by every judicial

> tribunal in which it has been attempted to be enforced.

Id. at 658.

Later, in *Citizens' Savings & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 663 (1874), the Court declared that a statute providing that "the homestead now owned by A should no longer be his, but should henceforth be the property of B" would be invalid because of the "limitations on [government] power which grow out of the essential nature of all free governments." Accord *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905).

As Thomas Cooley wrote during this era: "It may be for the public benefit" to do a variety of things, "but the common law has never sanctioned an appropriation of property based upon these considerations alone; and any such appropriation must be held to be forbidden by our constitutions." Thomas Cooley, *A Treatise on Constitutional Limitations on the Police Power of the States* 532-33 (1868). In short, "public use implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of the government to seize and appropriate it could exist for any other use." *Id.* at 531. As noted previously, the 20th Century saw the rise of a more relaxed view of public use and the role of judicial review. Some courts, such as the one below, have taken this relaxation too far. As seen next, many scholars are calling for reform.

B. A Growing Chorus of Commentators Have Called for a More Heightened Judicial Scrutiny of Private Takings

Government must have the ability to condemn private property when it is necessary to achieve important public objectives. But, if the ability to condemn private property is unchecked, then the rent seeking tendencies of special interests will inevitably abuse private property interests.

Recognizing that private takings are forbidden, the real question is: How can a court determine whether a taking is indeed a private taking rather than a taking for a public use or purpose pursuant to a project that will be facilitated by private parties? In many instances, there can be little question that a public use is involved, despite the fact that private parties will stand to receive benefits from a condemnation. Thus, when government condemns private property for a public road, there is no question that public use is involved, despite the fact that a multitude of private contractors may be involved in the construction. Because it is obvious that the sine qua non of public use is met—the public is actually using the facilities—there is little need of an exacting judicial scrutiny of the question of public use.

But, when the condemnation is not for a public facility, and is instead for a private enterprise, the question of public use is less easy to discern. Certainly, tearing down slums and replacing them with buildings that do not breed crime and blight may be in the public interest. And replacing crack houses with retail and office space may be in the public interest. But when is the public interest subsumed by a greater private interest—the interest of a developer in acquiring properties with minimal transactional costs for private gain? How can a court recognize such circumstances without some greater level of scrutiny than mere rational basis?

Because of the threat of rent-seeking abuse of the power of eminent domain, a growing chorus of commentators has called for the utilization of stricter scrutiny when some of the indicia of a "private taking" are present, namely the existence of a private redeveloper who is benefitting from a redevelopment condemnation in order to construct a private enterprise. Professor Kochan has written: "Given the importance of private property rights, it is critical to determine whether any rule, constitutional or otherwise, might be able to adequately protect those rights against expropriation by

legislative actors at the behest of special interests." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 59 (1998). He laments the trend in some courts to employ a relaxed standard of review in these circumstances:

> [C]ourts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate. Instead, the cases are filled with cliches regarding the "breadth" and "elasticity" of the "evolving" concept of public use, language indicating a dearth of theory—or perhaps a lack of any desire to develop one.

Id. at 76.

While Kochan is skeptical and thinks that the courts lack the resolve to more forcefully police the concept of "public use," other commentators believe that an effective resolution may be found if courts employ a more searching standard of review. In redevelopment cases, especially those where private entities stand to reap substantial profits from the condemnation of private property, Professor Merrill cautions for a more searching judicial review: "In cases where eminent domain is most likely to foster secondary rent-seeking behavior—where one or a small number of persons will capture a taking's surplus—courts should closely scrutinize a decision to confer the power of eminent domain." *See* Merrill, *supra*, at 87.

Likewise, Peter J. Kulick concludes:

> The purpose of imposing strict scrutiny review on public-private takings is to ensure that, assuming the development can meet the other factors, the project is vital and can be accomplished by no other means; that the land for the project cannot be acquired through the private market.

Peter J. Kulick, Comment: *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" —A Proposal to Redefine "Public Use,"* 2000 L. Rev. Mich. State U.-Det. C. L. 639, 681 (2000), text after note 250.

> Steven Jones argues for strict scrutiny, noting that
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> > [u]nder strict scrutiny analysis, the condemning authority must demonstrate a compelling public need. More specifically, the transfer of land from one private individual to another should only occur in exigent socioeconomic circumstances. In addition, the means chosen must be necessary to achieve the compelling objective. In other words, the state must show that benefiting third party exhausted every avenue of purchase on the open market.

Steven J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 311-12 (2000).

Russell A. Brine notes that in Supreme Court jurisprudence

> [t]he Court has been less deferential, however, to private transferee takings because they are more likely to further private use ends. Consequently, in private transferee cases the Court has required a more substantial degree of benefit and a stronger relationship between the taking and the public benefit or purpose.

Russell A. Brine, Note: *Containing the Effect of* Hawaii Housing Authority v. Midkiff *on Takings for Private Industry*, 71 Cornell L. Rev. 428, 432 (1986). *See also* Mark C. Landry, Note: *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419 (1985) (argues that drafters of

federal Constitution would not countenance condemnation for private gain).

It is the duty of courts to ensure that actions undertaken by state and local government conform to the restraints imposed by the state and federal Constitutions. Those Constitutions were designed neither to handcuff government when it pursues legitimate goals nor to countenance the abrogation of individual rights when to do so might facilitate the greater public good. Indeed, it is doubtful that a government action can truly advance the greater public good if it involves the destruction of individual rights: the cost for the public good taints and outweighs any public benefit. *See, e.g.*, Kochan, *supra*, at 87-88 ("In governmental condemnations for private use, the disruption in the sanctity of private property and the reductions in investment and productivity as a result of 'unsafe' title may outweigh the benefits obtained from the property's alternative use prompted by the transfer."). Because the role of government is to protect individual rights and liberties and to promote the general welfare, and because the role of the courts is to ensure that the government is hewing to the proper balance between the preservation of liberties and their destruction, then it is critical that courts recognize the balance and act to ensure that government does not overstep its authority while it advances the public interest.

C. Heightened Judicial Review of the Means Employed to Achieve the Legitimate Ends of Government Programs Will Comport with Recent Advancements in Takings Theory

The third question presented by Petitioners suggests that the standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), calls for a "revitalization" of the "public use" limitation of the power to condemn. Interestingly, this is precisely what a recent commentator has called for when she recognizes that in *Dolan* this Court did not call for heightened scrutiny of the legitimate *ends* of government action, but rather the *means* used to achieve

those ends. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003).

Professor Garnett notes two deficiencies with the current state of the law. First, despite the assurance of "just compensation," landowners are often not made whole because of intrinsic "demoralization costs." *Id.* at 938 (citing Frank I. Michaelman, *Property as a Constitutional Right*, 38 Wash & Lee L. Rev. 1097 (1981)).

Second, Garnett explains, "public-choice theory suggests that the compensation requirement alone will not necessarily deter the government from overacquiring private property." Garnett, *supra*, at 938. Comparing the government impetus to acquire property through condemnation, as opposed to the sort of exactions imposed in *Dolan*, she continues, "On the contrary, the need for a government to 'compete' for development might constrain the use of exactions but not the power of eminent domain." 71 Geo. Wash. L. Rev. at 938.

Building on the work of Professor Merrill, Professor Garnett suggests that increased scrutiny in eminent domain cases need not mean increased review of the legislative *ends* of redevelopment projects. Rather, more careful scrutiny of the *means*—here the condemnation of private property for the benefit of private developers—requires a more searching standard of judicial review.

By shifting to the means type of analysis employed by *Dolan*, Garnett believes the courts will be able to put a check on the instances where government employs takings of private property for the primary benefit of private developers without the province of the Legislature. One suggested mechanism for such a *Dolan* analog would be for the courts to ask whether

> the government [can] demonstrate that a given exercise of eminent domain was "reasonably necessary" to advance or "related in nature or extent"

> to the public purpose for which the condemnation power was invoked? This inquiry would continue to reflect the view that legislators, rather than judges, should determine what projects are in the public interest.

Id. at 964. While this inquiry may reflect a different approach than the courts often see coming from *Midkiff*, it is a workable approach that will serve to end some of the more flagrant abuses of the power of eminent domain.

To be sure, however, not everyone agrees with the idea that employing a stricter means based analysis will solve the problems. As Timothy Sandefur suggests:

> An approach whereby courts review means but not ends only results in more efficient ways of depriving people of their rights. . . . [L]andowners will not be safe from expropriation by . . . politically powerful parties until society solves the problem the Progressives left unsolved: delineating the boundary between public and private.

Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 S.U. L. Rev. 569, 671 (2003). Sanderfur may well be right; so long as too much deference is paid to those legislative choices which are driven by rent-seekers, no amount of scrutiny of the means to those ends will protect the rights of ordinary and relatively powerless citizens. The petition stage is not the time or place to resolve this debate; this is, however, the time and place for this Court to accept review in order to delve into the debate and for it to put a check on the abuses of eminent domain represented by cases such as the present one.

The third question presented by Petitioners raised the example of the *Dolan* analysis as a way this Court can restore

vitality to the Public Use Clause. Whether the best way to do that is through Professor Garnett's methodology, or the approach of those calling for greater scrutiny of government ends whenever any individual rights are at stake, it is clear that this Court needs to grant review to help guide the courts, government agencies, and individual landowners.

CONCLUSION

The time has come for this Court to rein in the growing abuse by some government agencies of the power of eminent domain. While some courts employ meaningful standards of review, others do not. There is presently plenty of intellectual ammunition for this Court to consider when it takes up the question of the appropriate role for judicial review of the condemnation of private property for largely private uses. The Petition for Writ of Certiorari should be GRANTED.

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Respectfully submitted,

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